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**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-575

SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-597

INTERSTATE COMMERCE COMMISSION,

Petitioner,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

No. 78-604

SEABOARD COAST LINE RAILROAD COMPANY, ET AL.,

Petitioners,

vs.

SEABOARD ALLIED MILLING CORP., ET AL.

**BRIEF IN OPPOSITION TO
PETITIONS FOR WRIT OF CERTIORARI**

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Respondents, Board of Trade of the City of Chicago, FS Services, Inc., Illinois Farm Bureau, Illinois Grain Corporation, and St. Louis Grain Corporation submit that the judgment of the United States Court of Appeals for

the Eighth Circuit reported at 570 F.2d 1349 presents no special or important issue that warrants issuance by this Court of the requested writ of certiorari.

STATEMENT OF THE CASE

These cases arose on petitions for review of actions and orders of the Interstate Commerce Commission.¹ The ICC had refused to suspend or investigate certain tariffs of the southern railroads even though respondents who are shippers and consignees petitioned for such relief and showed that the protested tariffs contained violations of the long- and short-haul provision of the Interstate Commerce Act, 49 U.S.C. § 4(1),² and patently violated the anti-discrimination provisions of §§ 2 and 3(1) of the Act, and the Elkins Act, 49 U.S.C. §§ 2, 3(1) and 41-43.³ The court of appeals held that respondents had raised substantial issues of the patent illegality of the protested tariffs before the ICC and that the ICC's determination not to investigate these issues should be vacated. It remanded the case to the ICC with instructions promptly to investigate those issues.

THE LOWER COURT'S JUDGMENT DOES NOT CONFLICT WITH DECISIONS AND PRECEDENTS OF OTHER COURTS OF APPEALS OR WITH DECISIONS OF THIS COURT

Petitioners assert that the vacation by the court of appeals of the ICC's order refusing to investigate is in conflict with *Asphalt Roofing Manufacturers Association v. ICC*, 567 F.2d 994 (D.C. Cir. 1977) which held that an ICC decision not to investigate is as unreviewable as a decision

¹ *Seaboard Allied Milling Corp. v. Interstate Commerce Commission*, No. 77-1729, and *Board of Trade of the City of Chicago v. Interstate Commerce Commission*, No. 77-1770, were consolidated by the court below.

² Since recodified as 49 U.S.C. § 10726.

³ Since recodified as 49 U.S.C. §§ 10741, 11902 and 11903.

not to suspend, the latter being unreviewable pursuant to *United States v. SCRAP*, 412 U.S. 669 (1973) and *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658 (1963). The holding in *Asphalt Roofing* is not in conflict because the tariff there, a general rate increase, had not been alleged to be patently unlawful. If it had been, the District of Columbia court would presumably have ruled properly that the ICC's order was reviewable, "to the limited extent necessary to ensure that such orders do not overstep the bounds of Commission authority." *Trans Alaska Pipeline Rate Cases*, U.S., 56 L.Ed. 2d 591 (1978), footnote 17 at 56 L.Ed. 2d 598.

Judicial review of an ICC order not to investigate tariffs as to which substantial allegations of patent unlawfulness have been raised is not contrary to any decision of this Court cited by petitioners or known to respondents. Respondents made substantial showings that the tariffs contained provisions forbidden by the Interstate Commerce Act. The ICC is "authorized and required to execute and enforce the provisions of" the act and has no authority or discretion to permit an apparently patently unlawful tariff to take effect.⁴ Having the duty to execute and enforce the provisions of §§ 2, 3(1), and 4(1) of the act, the ICC has no authority to decline to investigate the lawfulness of tariff provisions as to which substantial issues of unlawfulness have been raised. This Court, to respondents' knowledge, has never held otherwise, nor has it held that review of the ICC's refusal thus to discharge its duty is beyond the powers of the courts. The decision of the court below reviewing and vacating the ICC's refusal to investigate the tariffs does not conflict with *Asphalt Roofing* and is fully in harmony with this Court's holding in *Trans Alaska Pipeline*.

⁴ 49 U.S.C. § 12, recodified as 49 U.S.C. § 10321.

If the judgment of the court below had been directed toward the ICC's refusal to suspend, on the ground that the ICC had overstepped its authority in permitting an unlawful tariff to take effect, this Court's subsequent holding in *Trans Alaska Pipeline*, footnote 17, would have dispelled any doubt as to the lawfulness of such review. The court below, however, sought to circumvent the problem of review of the ICC's refusal to suspend which it thought was prohibited for any purpose by *SCRAP* and *Arrow*, 570 F.2d at 1352, by ruling, as the United States urged it to do, that for purposes of reviewability, the power to investigate is separate and distinct from the power to suspend. This dictum, on a technical holding, rendered unnecessary to its final judgment by *Trans Alaska Pipeline*, is the sole point of divergence between the court below and *Asphalt Roofing*. If this holding is questionable, it is also unimportant, and in the light of this Court's subsequent ruling, raises no substantial federal question that needs to be settled by this Court.

CONCLUSION

The petitions for writ of certiorari to the Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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